Filed 8/19/04 P. v. Losee CA2/1

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>TIMOTHY JAMES LOSEE,<br><br>Defendant and Appellant. | B168271<br><br>(Los Angeles County<br>Super. Ct. No. PA 040340) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Warren G. Greene, Judge. Affirmed.

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Russell S. Babcock, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan D. Martynec and Laura J. Hartquist, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant says evidence of a blood test should have been excluded since the sample was not drawn by an authorized person. He also objects to an instruction on concurrent causes. We reject his claims and affirm the judgment.

## BACKGROUND

On June 29, 2002, defendant and his girlfriend (Ishima) went to a birthday party. Before going, they had a few beers. She drank wine and he had more beer at the party. They left the party around 11:00 p.m., with defendant driving his mother's Lincoln. Witnesses driving 70 miles per hour on the freeway saw defendant pass them at a much higher rate of speed, then fishtail, lose control, and hit the center divider. Before long, several civilians and police officers happened on the scene and began treating defendant and Ishima, both of whom were injured. Defendant's lower body was still in the driver's seat, but his upper body was in the backseat. Ishima was dazed and complaining of pain in her stomach and chest. As luck would have it, one of those who happened upon the scene was a nurse and two others were emergency medical technicians. An officer activated the emergency lights on his patrol car. Two motorcycle officers set up flares and helped to control traffic.

About 15 minutes into the incident, an SUV came upon the scene, decided to whip around the right to avoid the slowed traffic, hit a car stopped on the shoulder, went airborne, slammed into the passenger side of the Lincoln, then ricocheted off and hit two other cars.

It quickly became apparent that defendant had been drinking. He failed field sobriety tests. Two preliminary screening breath tests gave readings of .18 and .19. At the hospital, a phlebotomist drew blood, analysis of which showed a .19 level of alcohol in defendant's blood.

A jury convicted defendant of the felonies of driving while under the influence and driving with a prohibited level of alcohol in his blood, causing injury. The trial court sustained a prior conviction allegation. Defendant received a 16-month prison sentence.

## DISCUSSION

### I

The Vehicle Code defines who is authorized to draw blood for the purpose of determining alcoholic content. Phlebotomists are considered "unlicensed laboratory personnel" under the section and are authorized to draw blood only under certain conditions set forth in the Business and Professions Code, such as that he works under the supervision of a licensed professional and has been trained by a licensed professional.

Under *Schmerber v. California* (1966) 384 U.S. 757, blood results are not admissible unless the prosecution demonstrates that the blood was drawn in a medically approved manner. Otherwise, the blood letting constitutes a violation of the Fourth Amendment. The question becomes whether blood taken by a phlebotomist who is not authorized by the Vehicle Code is necessarily drawn in a medically unacceptable manner. (Without going through a lengthy analysis of whether the phlebotomist here was authorized, we assume he was not.)

A recent case from the 4th District (over a dissent) has held that "[t]he mere fact that the phlebotomist may not have fully complied with the statutory requirements of [the Vehicle Code] does not create a Fourth Amendment violation. There may be other remedies available to challenge governmental activity in violation of statutes and regulations. However, such violations, without more, do not render a search or seizure unreasonable within the meaning of the Fourth Amendment." (*People v. Esayian* (2003) 112 Cal.App.4th 1031, 1039.)

According to *Esayian*, the *Schmerber* court pretty much gave blanket approval to the drawing of blood at a hospital. The question for us is not whether statutory technicalities have been met, but whether the actual blood letting was under sanitary, safe, risk-free, and painless conditions. "Blood tests are an accepted, safe method of reliably obtaining evidence in such cases. [Citation.]" (*People v. Esayian*, *supra*, 112 Cal.App.4th at p. 1040.)

A more recent and unanimous decision from the 4th District agrees with *Esayian*. "[T]he litmus test on a motion to suppress under the Fourth Amendment is the *manner* in

which the blood was drawn, and . . . violation of a state regulatory scheme 'does not render [a search] unreasonable within the Fourth Amendment and . . . such statutory violations cannot serve as the basis for the application of the exclusionary rule.' [Citation.]" (*People v. McHugh* (2004) 119 Cal.App.4th 202, 213.)

We agree with the 4th District. The phlebotomist in our case had been so engaged for ten years and was certified by the State of California as such. During that period, he had drawn blood from approximately 200 patients per month. He testified as to the swabbing solution he used on defendant's arm and the type and gauge of the needle. By all accounts, it was a sanitary and safe procedure in a hospital. Nothing in the record shows anything unreasonable about the blood letting.

**II**

Defendant objects to the following jury instruction:

"There may be more than one cause of the injury. When the conduct of two or more persons contributes concurrently as a cause of the injury, the conduct of each is a cause of the injury if that conduct was also a substantial factor contributing to the result. A cause is concurrent if it was operative at the moment of the injury and acted with another cause to produce the injury.

"If you find that the defendant's conduct was a cause of the injury to another person, then it is no defense that the conduct of some other person contributed to the injury.

"However, an intervening act may be so disconnected and unforeseeable as to be a superseding cause that, in such a case, the defendant's act will be regarded as not being a cause of the injury sustained.

"It is not a defense that some other person was negligent and a contributory cause of the injury."

Defendant complains that the instruction allowed the jury to find him guilty even if the panel concluded that the SUV crash had inflicted all of Ishima's injuries. He says the SUV could not have been a concurrent cause, since that crash occurred well after the Lincoln crash. We quote from defendant's reply brief: "The car [defendant] drove had

come to a complete stop; at least three civilian passenger cars stopped at the scene of the accident. Two off-duty police officers, at least one on-duty patrol officer, and two police motorcycles arrived at the scene and began rendering aid and directing traffic. It was only then, when a nurse and at least two officers were surrounding the Lincoln and tending to [defendant's] injuries, flares had been set up, officers were directing traffic, and a small crowd of bystanders had gathered, that the [SUV] came barreling onto the scene and collided with the Lincoln."

We reject defendant's claim. The evidence is overwhelming that Ishima suffered significant injuries when the Lincoln hit the center divider. She was found in the car dazed and complaining of pain in her chest and stomach.

The most likely scenario is that both crashes inflicted some injury on Ishima, who ended up with a broken collarbone and three broken ribs. The first person on the scene, a nurse, found defendant's lower body occupying the driver's seat and his upper body twisted into the back seat. This indicates a violent crash. Two police officers, both emergency medical technicians, assisted Ishima. She complained to one of pain in her chest and stomach. She appeared dazed. The other technician placed an oxygen mask over her face. All of this took place before the SUV crashed into the Lincoln.

The defense consisted of an expert who testified that the Lincoln was going "only" 64 miles per hour when it spun out of control. The expert felt it was possible defendant was injured in the first crash, but not possible Ishima was. He understood the testimony to be that she complained of pain only after the second crash. Told that "indeed, there is a witness who says that after the first collision, she was complaining of pain to her chest and stomach" the expert allowed as to how "it's possible" Ishima was injured during the first crash. But, he felt the "forces involved" were not sufficient to cause injury. "The forces involved were more equivalent to backing out of a parking lot stall and not realizing that there's a big concrete light post behind you, and you goose it a little bit too much and go eight to ten miles an hour, and bam, now you've got a big dent in most bumpers, but you don't have whiplash injuries. You don't have anything except anger and frustration."

This utterly fails to explain why a dazed Ishima complained of torso pain to the officer who arrived on the scene well before the SUV. It is clear that Ishima was injured during the first crash. The instruction was proper in order to disabuse any juror of the notion that additional injury from the SUV crash would somehow absolve defendant.

In addition, even had the evidence somehow shown that the SUV caused *all* of Ishima's injuries, we are not prepared to hold, as a matter of law, that the circumstances constituted a superseding cause and could not have been a concurrent cause. It would have been a factual matter for resolution by the jury as to whether defendant set into motion a foreseeable set of circumstances leading to Ishima's injuries. To this end, the trial court gave the following jury instruction, requested by the defense:

"Intervening causes in criminal cases are typically described as either 'dependent' or 'independent[.'] A dependent intervening cause will not absolve a defendant of criminal liability while an independent intervening cause breaks the chain of causation and does absolve the defendant.

"If an intervening cause is a normal and reasonably foreseeable result of the defendant's original act, the intervening act is dependent and not a superseding cause, and will not absolve the defendant.

"If the intervening cause is an extraordinary and abnormal occurrence, the intervening act is independent and breaks the chain of causation thereby absolving the defendant. It is only an unforeseeable intervening cause, an extraordinary and abnormal occurrence, which rises to the level of an exonerating, superseding cause absolving the defendant.

"If the evidence raises a reasonable doubt as to whether an intervening cause was a normal and foreseeable result of the defendant's original act, then you must find that defendant's act was not the cause of the victim's injuries."

We find nothing "extraordinary" or "abnormal" about an inattentive or reckless driver barreling into a car that has crashed on the freeway and is sitting in lanes.

**DISPOSITION**

The judgment is affirmed.

NOT TO BE PUBLISHED.

ORTEGA, J.

We concur:

SPENCER, P.J.

VOGEL, J.